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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 307

DAVID H. BERMAN AND DOROTHY BERMAN, Co-Partners, Doing Business Under the Firm Name and Style of David H. Berman Company,

Petitioners,

vs.

ERNEST L. LEVINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY S. BLUM,
Attorney for Petitioners.

DAVID M. BURRELL,
RICHARD REX PARKIN,
J. ROY BROWNING,
Of Counsel.

THE BLAKEMORE-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in this case.

I.

A SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was brought by the respondent to enforce his alleged rights to reemployment by petitioners under the provisions of the Selective Training and Service Act of 1940 (50 U. S. C. A. App. § 308). Trial was by the District Court without a jury and there the issues were found for petitioners (Tr. 103). The Circuit Court of Appeals for the Seventh Circuit, Judge Briggle dissenting, reversed and remanded with directions to restate the conclusions of law in accordance with that opinion (Tr. 136).

Petitioners, doing business as partners, are engaged in wholesale merchandizing. From January, 1941 to April, 1942 respondent was employed by them as a salesman. On the latter date he left to enter the armed services of the United States, from which he was discharged on December 17, 1945. The following day he applied for reemployment and petitioners thereupon offered to reemploy him as a salesman, to assign a territory to him, and to allot* to him sufficient merchandise so that his earnings for the ensuing year would be a minimum of $7,500.00, which was a 50% increase over his earnings in the year preceding his "leave of absence."**

Respondent refused this offer on the theory that he was

* When this offer was made, demand so far exceeded the supply that petitioners' business was done on an allotment basis and the offer to give respondent $100,000.00 worth of merchandise to distribute at a commission of 7½% was a guarantee that respondent would make $7500.00.

** The trial court's findings of fact (Tr. 100) were adopted by the Circuit Court of Appeals (Tr. 136) which reversed solely "* * * on the assignment of error that the findings of the (District) court do not support the conclusions of law." The trial judge's findings, which are concise and detailed, are reprinted in the appendix hereto.

entitled to insist on the right to determine his territory and his commission rate on merchandise sold notwithstanding any and all changes in the business structure and general economy since his departure. The Court of Appeals adopted this construction of the statute and held that it could specify the details of respondent's employment. Authority for this conclusion must be found, if at all, in the abstractions of the statute (50 U. S. C. A. App. § 308) which requires restoration of the employee "to such (former) position or to a position of like seniority, status and pay * * *." And, in these abstractions—"position" and "status"—the court below found legislative directives requiring the court to evolve a wealth of detail to be impressed on the employer-employee relationship.

We start with the proposition that the Act is to be liberally construed so that the returning veteran can find that he has maintained his place, so that he has not been penalized by his enforced absence. No one could dispute that. Nor, did the court below find or even intimate, that respondent lost ground he would otherwise have gained had he remained at home. On the contrary, the decision is solely based on the premise that the court can look into the details of a business and say precisely what the returning employee must do or must not do in order for the court to hold that he has his former position, or a position of like status. We suggest that this places an impossible burden upon the courts and transcends the limits of meaning that may be wrung from the words employed in the statute when placed in the context of the general legislative intent and the realities of the business world.

Otherwise stated, we suggest that there is a broad area within which Congress has not expressed any directives whatever. To particularize this statement of the case, may we see for a moment where the issue as stated by the Circuit Court of Appeals has led: There are a great many

ways wherein one might describe the relationship between respondent and his employers in the year or so that he worked for them prior to leaving for service. There are many ways in which these employers, or any prospective employers, might describe the type of job offered to any applicant. The Circuit Court of Appeals assumed that it should take the history of the employment insofar as the record disclosed it and match it with its conception of the offered employment much as one would fit pegs into the proper sized holes. If, however, this is to be done, it seems that it should be done consciously and with the realization not only of the highly detailed nature of the items insisted on, but of the vast number of descriptive items entirely omitted from consideration.

Prior to going to the army, respondent's employment could have been described in many ways. With the aid of a motion picture machine and a sound track, and by referring to the various written documents that passed through his hands, it would have been possible to have gotten a fairly complete summary of his business relationship. Nothing, however, would have told the whole story: No matter how many details were added there would always have been some left out. The most obvious fact is that if respondent had been asked the name of his employer he would have named petitioners and if he had then been asked his position he would have said "salesman." Becoming more particular he could have described his employment as subject to the direction of the petitioners. There was no written contract and the conditions of employment might, therefore, be changed from time to time. He could have added that he sold floor coverings, and if he had wished to be more specific still he could have said that he had six lines upon which he received commissions varying from 3 to 10%. He had a certain territory in which he operated at a time when selling was competitive.

This much the record shows, but slight imagination indicates how many more details might be added to vary or modify the terms of his former employment.

The Circuit Court of Appeals observed this fragmentary array of descriptive facts and concluded that respondent could not be said to have his old position offered him, or one of like status, unless he had precisely the same territory and unless his commission were unchanged on the only one of the six items now handled by petitioners. These two descriptive items—territory and commission rate on one line of floor coverings—struck the court below as the key to the problem. Apparently forgotten are the remaining details disclosed by the record as pertaining to his former employment: Respondent cannot operate in a competitive market, but must do business on an allotment basis. Should the court have attempted to bring this phase of his offered employment in closer harmony with conditions of his prior employment? The petitioners no longer carry five of the six lines that respondent formerly handled. Should the court have ordered petitioners to make new contracts with suppliers so as to give respondent these omitted lines in order to make his offered employment "identical" with his past employment?

These questions are posed to indicate the impossibility of the issue as it was conceived by the Circuit Court of Appeals. But, it is also possible that we have failed to state the issue which the Court of Appeals thought was controlling. The court said, "The petitioner had worked in his old territory in less lush days." Later we find, "* * * that the returning servicemen shall * * * share in the abundant prosperity when he returns." And, petitioners' business is referred to as "inordinately prosperous because of the war the petitioner went away to serve in." May we emphasize that if this petition should be granted there would be no occasion to argue the truth

of these charges as there was no such issue upon which evidence could be adduced. If, however, these are proper subjects of inquiry in a proceeding under the statute, then our Anglo-American system of jurisprudence requires that the subject be frankly recognized as an issuable one so that parties in similar cases may prepare their evidence accordingly.

Your petitioners do not seek by any technicality to relieve themselves of any obligation which may devolve upon them; they are completely in accord with the policy of the Selective Training and Service Act in its concern for the returning veteran. We suggest, however, that the technique adopted by the Circuit Court of Appeals is not calculated to serve those ends. To restrict the veteran to a position as nearly identical with his former one as human ingenuity could devise might often be inimical to his best interests, not to mention that it could easily be disruptive of business. And here, where the respondent was offered the type of work he has performed with an increase in pay it was, we suggest, unprecedented for the court to take two out of the infinite number of descriptive items that might be set down and to hold that those two had to be imposed on his reemployment, irrespective of the fact that these two details of the employment had been modified substantially prior to this time as to all other employees.

In a properly constituted proceeding where there were triable issues on the point, petitioners would be prepared to disclose that, judged by acceptable standards, they have violated no rules of law or ethics and that their profits are wrongly designated inordinate. But, the Selective Training and Service Act sets up no technique whereby such questions may litigated and it was worse than error to inject these issues into the case.

Jurisdictional Statement.

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. A. Sec. 347). The judgment, of which review is sought, was entered on May 6, 1947 and became final upon the denial of the petition for rehearing on June 2, 1947 (Tr. 144).

Questions Presented.

1. Does the Selective Training and Service Act of 1940, as amended, regulate the details of a veteran's reemployment so as to require exact confirmation with the details of his former employment?

2. Has an employer complied with the Selective Training and Service Act of 1940, as amended, if he offers reemployment of the same generic type as that formerly performed and with better pay?

3. Is the Selective Training and Service Act of 1940, as amended, designed to effect a distribution of an employer's profits deemed inordinate and, if so, what are the standards for judging the permissible limit of profits?

Reasons Relied on for the Allowance of the Writ.

Exercise of the power of this Court to grant the writ of *certiorari* herein prayed is sought upon the following grounds:

1. The Court of Appeals in construing the Selective Training and Service Act so as to require the regulation of all details of employment has adopted a construction of that Act which is untenable, unworkable, and unauthorized by any of the decisions of this Court.

2. In holding that legal acceptability of the proffered reemployment is to be judged by the relative condition of wealth or prosperity of the employer, the Court of Appeals has adopted a construction of the Act which is untenable, unworkable, and not authorized by any decisions of this Court.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9176, *Ernest L. Levine, Petitioner-Appellant*, v. *David H. Berman and Dorothy Berman*, Co-Partners doing business under the firm name and style of David H. Berman Company, Respondent-Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States. Your petitioners further pray that the judgment herein of the said Circuit Court of Appeals be reversed by this Court, and for such further relief as to the Court may seem proper.

DAVID H. BERMAN and DOROTHY BERMAN,
Co-Partners, Doing Business Under
the Firm Name and Style of David
H. Berman Company,
Petitioners,

By HENRY S. BLUM,
Attorney for Petitioners.

DAVID M. BURRELL,
RICHARD REX PARKIN,
J. ROY BROWNING,
Of Counsel.

August 27, 1947.

IN THE

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vs.

ERNEST L. LEVINE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS AND ORDERS BELOW.

The District Court rendered an oral decision which is reported on page 83 of the Transcript of the Record filed herewith.

The official report of the decision of the Circuit Court of Appeals herein is in 161 F. 2d 386; it is reprinted on page 136 of the Transcript of Record filed herewith.

The order of the Circuit Court of Appeals denying a rehearing is set forth at page 144 of the Transcript of the Record filed herewith.

JURISDICTION.

The facts supporting the jurisdiction of this Court are set forth in the petition.

Inasmuch as this petition is timely, it is reasonably certain that this Court has jurisdiction to review the order of the court below should the questions presented be deemed of sufficient importance to merit review.

STATEMENT OF FACTS.

The facts are sufficiently set forth in the petition.

SPECIFICATION OF ERRORS.

If the writ is granted, petitioners will urge that the Court of Appeals in the instant proceeding erred in the following respects:

1. In reversing the District Court and holding that the petitioners had not complied with the requirements of the Selective Training and Service Act of 1940, as amended.

2. In construing the Selective Training and Service Act of 1940, as amended, as authorizing judicial intervention to insure that the veteran have a proffered job which is precisely the same in all its details with the job formerly held.

3. In holding that an assumed relative prosperity of the employer is a factor which the Selective Training and Service Act injects into the question of the veteran's reemployment.

ARGUMENT.

POINT I.

In Construing the Selective Training and Service Act of 1940, the Court of Appeals Extended the Scope of Judicial Inquiry and Concern to Areas of Detail Not Authorized by the Language of the Act, or Any Decision of This Court.

The novelty and importance of this issue may be sensed by realizing that the only decisions of this Court to date concern "seniority"* which is in no way involved herein.

The significance of the issue may be restated by emphasizing what this case does not involve. In mass production industries, the claim of an employee to be restored to his former "position", or one of "like seniority, status and pay" can be put into sharp focus. The statutory words have definite referents in the context provided by the working situation, regarded as a physical fact and also as the job content is detailed in the typical union contract. A man is a "rotary boring machine operator on No. 3 cylinder block line". Or, is he just a "machine operator"?

If it is difficult to find just what an employee *is* in the formalized industry, how much more difficult it is to be specific in the thousands of small businesses such as the one involved here; in fact, it is impossible.

May we turn to the question of impossibility in statutory construction: It has been said that "the difficulties of so-called interpretation arise when the legislature had no

* *Fishgold* v. *Sullivan Dry Dock & Repair Co.*, 328 U. S. 275; *Trailmobile Co.* v. *Whirls*, ... U. S. ....., 91 L. ed. 939, 67 S. Ct. 982.

meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind * * *".* This process of judicial extrapolation is concededly difficult and frequently the result is unsatisfactory. How can this Court say what the legislature meant when it did not mean anything? At least the problem enforces sufficient difficulties so that the process should not be undertaken, we suggest, where the statute can be given meaning and effect without extending its regulatory features into these nebulous areas.

Neither the general intention of Congress, nor the language of the statute requires, or makes necessary or advisable, judicial determination in the fields attempted by the decision of the court below. We hope it is reasonably clear that we are arguing, that, at a time when this Court and other courts are faced with a tremendous burden of litigation it is unnecessary and improper for the courts to invite still further litigation by decisions which in effect state that there are innumerable areas where there are "right" answers and "wrong" answers, and where the "right" answers can be found by going to the courts. More specifically: There are an infinite number of "jobs" which petitioners might have offered respondent, all of which might well have been within the general framework of experience that he acquired formerly, and all of which would have led him to reply when asked as to his occupation that he was a "salesman". Some of these jobs respondent might have liked very well, some middling well, some not at all. Congress did not think about this and, we suggest, that, except in an extreme case which

* As quoted from Gray by Jerome Frank in a monograph, "A Lawyer Looks at Language" appended to Hayakawa's "Language in Action" (Harcourt Brace & Co. 1941).

we need not postulate here, all of these jobs, though different from each other in some respects and though different from his former job in other respects, would satisfy the statute. For the court to say that it can pick out just precisely the right job with the right characteristics and say "that's it" is to invite litigation and, we might add, extremely difficult decisions to make.

In a related context this Court, in the *Fishgold* case (328 U. S. 275), said that the employee is entitled to step back on the escalator at the place he would have occupied had he kept his position continuously during the war and that he does not step back on where he stepped off. In this case, however, the Court below has decided that the employee shall step back precisely where he stepped off. Moreover, if the escalator has moved with consequent change of scenery the Court of Appeals believes it should order the old scenery restored.

Point II.

The Selective Training and Service Act Affords No Technique for Varying the Terms of Employment Based on an Assumption as to the Employer's Prosperity.

Every fact found by the trial judge established petitioners' good faith. Moreover, the trial judge who heard the evidence said in the course of delivering his oral opinion (Tr. 84): "If there was anything done by the respondents (*i. e.*, petitioners herein), a subterfuge to change the territory, subterfuge to allow or make room for more salesmen, then I might take a different view; but from the evidence I am convinced that these respondents were acting in good faith." Moreover, the Circuit Court of Appeals accepted the trial judge's findings of fact and nowhere did it cast any aspersions on the ethics, morality, or good faith of

petitioners, unless the euphemistic allusions to petitioners' supposed profits can be regarded in this light.

How could anyone have predicted that the Court of Appeals would become involved in a question of the redistribution of wealth as stimulated by this particular statute? This question requires a brief digression: This Court is certainly no place for "special pleading." Although litigants by the hundreds have burdened the Court with cries to go back to some supposed golden age when "certainty" prevailed, we hazard the guess that the vast majority of these were encrusted conservatives who merely wanted a return to their particular brand of nebulous word magic.

We hope that we appear as less egocentric, as more capable of attaining a perspective. Our hope is fortified by what we believe to be a dispassionate analysis of the statute and the record. There was nothing here to have led petitioners to prepare a case for argument based upon any supposed equities stemming from the manner in which they made their money or the success of their endeavors. If the veteran's reemployment is to be altered in certain particulars (supposedly in the employee's favor) because his employer's business profited *inordinately*, or because the employer had *lush* times, then it is only proper that criteria be established so that the possibility or probability of transgressions can be predicted in any given instance and tried as is befitting a serious issue. Moreover, the situation has its converse for it would then be necessary to decide if a slump in the employer's bank account could be reflected in the terms of the proffered employment.

Point III.

The Questions Involved Are of Public Interest and Should Be Resolved by This Court.

In the first place, may we suggest that the operation of this Act should be delineated by judicial construction so that both employer and employee may be able to predict how far the courts will go in determining precise details under the stimulus of the statutory abstractions such as "position" and "status."

Secondly, we find no decisions of this Court upon the subject except for those in the related field of seniority. If we have been reasonably articulate it will appear that it is just as important to obtain a decision from this Court in the present factual situation as it was to find out how the statute applied to large industry. There the "escalator" is fairly visible and definite due to the formalized manner in which these larger business units conduct their operations. However, this Court deemed it important to say, not that the escalator should be stopped, but that the employee should get on where he would have been except for his absence.* Here, as well, the escalator has moved though it is less of a formal machine and therefore more difficult to place precisely. We suggest that in this context it is equally important to hold that the employee is only entitled to get on where he would have been had he not left. By refusing this rationale we believe the court below became involved in a maze of impossible detail.

Lastly, we believe that it is of public importance to know if the financial condition of the employer should be added as a plus or minus factor in detailing the conditions of employment. On principle it is just as disastrous to our system of jurisprudence to have issues magically appear

* *Fishgold v. Sullivan Dry Dock & Repair Co.*, 328 U. S. 275, 284.

from nowhere as it is to have definite issues but ghostly parties. Recently it was thought important to hold that there cannot be issues without opposing parties.* Because no one could foresee what issues the Court of Appeals would inject, it can properly be said that this was a case of opposing parties without issues or, more correctly, without legal issues.

For these reasons it is submitted that the petition should be allowed and the order of the Circuit Court of Appeals reversed.

All of which is respectfully submitted.

HENRY S. BLUM,
Attorney for Petitioner.

DAVID M. BURRELL,
RICHARD REX PARKIN,
J. ROY BROWNING,
Of Counsel.

August 27, 1947.

* *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575.

APPENDIX.

In reading the findings of the trial court it should be remembered that the employee is there referred to as the "petitioner" and the present petitioners as the "defendants."

"Findings of Fact.

"1. The petitioner, then 25 years of age, was employed by the defendants in January, 1941, in the capacity of a junior salesman to sell to retail establishments a line of floor coverings for which the defendants held exclusive sales contracts from the manufacturers thereof. There were six separate floor covering products, made by different manufacturers, represented in the defendants' line of merchandise and the petitioner was to sell all of these products to the trade under the direction of the defendants. The terms of employment agreed upon between the petitioner and the defendants were not reduced to writing and there was no agreement as to the duration of the employment. The petitioner was to sell in the Chicago office of the defendants when he was not on the road, but was to travel by automobile through a particular territory and call upon existing and prospective customers in that territory whenever so directed by the defendants. The particular territory included the State of Illinois (excluding Chicago, Oak Park and Evanston), the State of Indiana (excluding Indianapolis), the State of Michigan (excluding Grand Rapids and Detroit), the State of Wisconsin (excluding Milwaukee), the eastern half of the State of Minnesota (excluding St. Paul and Minneapolis), and the eastern half of the State of Iowa (excluding Des Moines). The petitioner also received commissions upon sales made in the State of North Dakota, the State of South Dakota and the western half of the State of Minnesota, although he never travelled in that territory. The

petitioner's compensation consisted of commissions based upon a percentage of the defendants' gross sales derived from all of the territory above described, whether or not the sales were made by the petitioner or came in through other sources. The rate of commission varied between the six different floor-covering items represented by the defendants, and extended from 10 per centum on some merchandise to 3 per centum on other. The petitioner was required to pay all of his expenses while travelling on the road for the defendants.

"2. The petitioner was employed by the defendants from January, 1941, until April, 1942. During this entire period his commissions received from the defendants totalled $5,697.43. In April, 1942, the petitioner left the employment of the defendants to enter the armed service of the United States and he remained in such service until his discharge therefrom on December 17, 1945. On December 18, 1945, the petitioner made application to the defendants for reemployment.

"3. On December 18, 1945, the defendants were engaged in the sale of a line of floor coverings known as 'Tumble-Twist' rugs, as exclusive selling agents throughout the United States for Libertyville Textiles, the manufacturer of such rugs. At that date the defendants did not represent or sell the products of any other manufacturer of floor coverings and no longer sold the additional five rug products of other manufacturers they had sold at the time the petitioner entered their employment in 1941. The line of 'Tumble-Twist' rugs, which was first introduced by the defendants to the trade late in 1940, has greatly increased in volume of sales, and the total sales for the year 1946 will be about six times the total sales made during the year 1941. The demands of the trade for these rugs have been greatly in excess of the number manufactured, and since January 1, 1943, the defendants have allotted rugs among their customers based upon an elastic plan having regard to territorial coverage, past performance and desire to develop certain key accounts. Commencing January 1, 1946, the defendants in con-

junction with Libertyville Textiles, the manufacturer of the rugs, have committed themselves to a national advertising campaign wherein the defendants will pay 25% of the total expense of the campaign which will cost between $75,000 and $100,000. The defendants did not advertise 'Tumble-Twist' rugs during the period of petitioner's employment by them.

"4. Throughout the period the petitioner was employed by the defendants, the defendants paid to their salesmen, including the petitioner, a commission of 10 per centum on the sales of 'Tumble-Twist' rugs, but commencing in 1942 with some salesmen, in 1943 and 1944 with others, and on January 1, 1946, with all of the new men, the commission rate on 'Tumble-Twist' rugs was reduced to 7½ per centum. All salesmen now receive this rate of 7½ per centum. Prior to the date of petitioner's entry into the armed service, there were no allotments of merchandise to salesmen or territories, but commencing in 1943 and continuing at the present time each salesman is given an over-all allotment of a certain amount of merchandise which he divides among his accounts under the defendants' sales-manager's supervision.

"5. The defendants employed a sales-manager in September, 1942, who assigns territory to salesmen and determines the allotments of merchandise. He has reduced the extent of all salesmen's territories and there presently are three salesmen who sell for defendants in the territory described in petitioner's petition filed in this cause.* One of these three salesmen has a territory composed entirely of segments of the territory described by the petitioner, and the other two of these salesmen have segments of the described territory and additional territory outside the described territory.

"6. On December 18, 1945, when the petitioner ap-

*A typographical error resulted in the following sentence being inserted at this place in the Circuit Court of Appeals record: "One of these three salesmen has a territory described in petitioner's petition filed in this cause." By stipulation (Tr. 151) entered into since the final judgment below the parties have agreed that this shall be eliminated from the record in this court.

plied for reemployment with the defendants, the defendants offered to reemploy him as a salesman, to assign a territory to him and to allot to him not less than $100,000 of 'Tumble-Twist' rugs during the next succeeding year, upon which he would receive a commission of 7½ per centum so that his earnings during the year would be not less than $7,500.00. The petitioner refused this offer.

"7. On January 25, 1946, the defendants mailed by registered mail to the petitioner a letter offering to reemploy the petitioner as a salesman with the same seniority as though he had been employed continuously since 1941, to assign a territory to him, to pay him a commission of 7½ per centum of his sales and to allot sufficient merchandise to his territory so that his commissions for a one-year period would be not less than $4,922.83. This sum of $4,922.83 equalled the total commissions earned by the petitioner during the last twelve months of his employment by the defendants prior to his entry into the armed service. This offer of reemployment provided that an additional sum of $410.00 would be credited to petitioner's commissions if he accepted the offer at that time, to represent commissions he might have earned from December 18, 1945 to January 25, 1946, so that his total commissions for twelve months would be not less than $5,332.83. The petitioner received the defendants' letter offering such reemployment, but he has never made any reply to such offer."